United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7306

To be argued by
MARK C. RUTZICK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

P/S

PAMELA SCHNEIDER, PATRICIA WHITE, MARIE MYRTIL, JANE ROE AND LYNN ANN TYLER, on behalf of themselves and their minor children and all others similarly situated,

Plaintiffs-Appellees,

BETTI S. WHALEY, individually and as Commissioner of the Agency for Child Development of the City of New York; J. HENRY SMITH, individually and as Commissioner of the Human Resources Administration of the City of New York; and PHILIP TOIA, individually and as Commissioner of the Department of Social Services of the State of New York,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT PHILIP TOIA

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Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (Hon. John M. Cannella, U.S.D.J.) dated July 1,

1976 granting a preliminary injunction against the municipal defendants enjoining defunding of 49 day care centers funded by New York City and partial defunding of a number of others, and requiring the municipal defendants to conduct certain due process hearings prior to the defundings.

Question Presented

Did the District Court err in granting a preliminary injunction premised on its holding that plaintiffs have a cognizable property interest in the continuation of receipt of day care services in a specific geographical location, when neither New York law nor any other source creates such an interest, and the detrimental impact of the injunction upon New York City is substantial?

Statement of the Case

Appellant Toia joins in the statement of Facts and Opinion Below set forth by the Municipal Defendants in their Brief, and respectfully refers this Court to pages three through twelve of that Brief.

ARGUMENT

THE COURT BELOW ERRED IN GRANTING A PRELIMINARY INJUNCTION PREMISED ON ITS HOLDING THAT PLAINTIFFS HAVE A COGNIZABLE PROPERTY INTEREST IN THE CONTINUATION OF RECEIPT OF DAY CARE SERVICES IN A SPECIFIED GEOGRAPHICAL LOCATION.

The District Court granted a preliminary injunction to the class of plaintiffs enjoining the defunding of the 49 day care centers pending fulfillment of the due process requirements imposed by that court. The issuance of the preliminary injunction -- which in effect gave the plaintiffs all the relief they sought in the action -- was based upon the holding of the District Court that plaintiffs had an entitlement to the receipt of day care services at a location as accessible as the one at which they now receive those services. This holding is properly subject to review by this Court at this time. Societe Comptoir De L'Industrie Cotonniere Establissements Boussac v. Alexander's Dept. Stores, Inc., 299 F. 2d 33, 35-36 (2d Cir., 1962).

Based on this holding the District Court apparently found that the plaintiffs had met the tests

of likelihood of success on the merits and irreparable harm (or sharp tipping of the balance of hardships) required to justify the extraordinary remedy of a preliminary injunction. See Gresham v. Chambers, 501 F. 2d 687 (2d Cir., 1974); Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F. 2d 247 (2d Cir., 1973). Because the District Court misapprehended the applicable law and misperceived the balance of hardships in the case, its grant of preliminary relief was in error and should be reversed by this Court. The plaintiffs in this case have virtually no chance of success on the merits, and the harm to New York City from this injunction far outweighs the minimal impact on most or all the plaintiff class.*

A. Plaintiffs have no cognizable property interest in receipt of any day care services.

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and

* Appellant Toia has been informed that the appellees have now filed a Notice of Cross-Appeal in connection with the District Court's denial of statutory fair hearings to the plaintiff class. That issue is not properly before the Court on this expedited appeal and the Court should give no consideration to it.

property" Board of Regents v. Roth, 408 U.S. 564, 569 (1972). Thus, to establish their claim to due process rights in connection with the defunding of the 49 day care centers, plaintiffs must demonstrate a constitutionally cognizable liberty or property interest in the provision of day care services specifically at those 49 centers. Their failure to do so will defeat their claim in this action. The court below premised its decision on its discovery of a property interest -- as a matter of New York law -- in the receipt of day care services in a specific location. Since that holding is in error, the decision of the court below should be reversed.

The Supreme Court of the United States has defined both the source and the contours of constitutionally cognizable property interests.

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . .
>
> "Property interests, of course, are not created by the

> Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Board of Regents v. Roth, supra, at 577.

To determine if plaintiffs have a "legitimate claim of entitlement" to day care services in a particular location -- or in any location -- the Court must look to New York law, the sole source of any such entitlement in this situation.

The best source of understanding of property interests created by state law is the decisional law of the New York state courts. Where, as here, the discovery of a property interest rests on interpretations of state statutes and regulations, the interpretation of the state courts controls. Bishop v. Wood, -- U.S. -- , 44 U.S.L.W. 4820, 4821 (June 10, 1976). The Appellate Division of the Supreme Court of the State of New York for the Second Department has held authoritatively that the provision of day care services by a center did not implicate "constitutionally

protected rights" for the center such as to trigger due process requirements. Our Children's Day Care Center v. Whaley, -- AD2d --, N.Y.L.J., May 5, 1976, p. 12, col. 3 (not yet officially reported). It follows that if the property right does not run to the provider of the benefit, it cannot run to the recipient of the benefit either. This view of the provision of day care services as not implicating cognizable property rights under New York law must be given due deference by this Court.

Close scrutiny of the New York day care program also demonstrates the absence of a property interest for recipients of day care services under State law. The New York day care program operates as part of the complex of social services authorized for block grant funding by Title XX of the Social Security Act, 42 U.S.C. § 1397, et seq. Title XX authorizes reimbursement to the States by the federal government to the extent of either 75% or 90% of expenditures in a wide variety of programs including services to children and the aged. Title XX does not require any particular program to be offered; it merely authorizes reimbursement for any state program aimed

at the goals specified in the statute. 42 U.S.C. § 1397(a). Of particular significance is that Title XX nowhere requires the states to provide the services funded under it to every member of any class of eligible recipients. Its only restrictions are that no reimbursable services be provided to members of families with income in excess of a set limit, 42 U.S.C. § 1397a(a)(6), and that 50% of aggregate expenditures under the program go for services to recipients of Aid to Families with Dependent Children, Supplemental Security Income or Medicaid, 42 U.S.C. § 1397a(a)(4). Within those broad income and welfare status eligibility guidelines, the states are left with full discretion as to the scope and nature of the services provided.

Implicit in the breadth of the eligibility guidelines and the funding limitations, see 42 U.S.C. § 1397a(a)(2)(A), of Title XX, is the idea that not every person within the guidelines will receive services funded under the program. This idea, inherent to the block grant funding concept, stands in stark contrast to the explicit requirement in

42 U.S.C. § 602 that every individual eligible for authorized benefits must receive those benefits -- the requirement which gave rise to the holding of the Court in Goldberg v. Kelly, 397 U.S. 254 ((1970), that "[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them." Id. at 262. Thus the District Court's citation of that language from Goldberg (opinion at p. 9) in support of its discovery of a property interest in this case is singularly inapt, and suggests that an incorrect perception of the structure of Title XX colored its view of the rights attaching to recipients of Title XX services.

The District Court supported its finding of a protectable property interest with the citation of one fact that is simply incorrect. The District Court appears to indicate (at p. 9) that New York City has in fact made day care services available to all those eligible for them under federal and state guidelines. The record, however, indicates what is well known -- day care services are not available to all eligible parents. Rather, the existence of

waiting lists for entry into virtually every center indicates that demand far exceeds the supply of day care services. See Municipal Defendants' Notice of Cross-Motion to Dismiss, Exhibit "I", p. 4.* Thus the factual predicate of the District Court's holding is in error.

The gravest error of the District Court was its holding that New York law creates a cognizable property interest in receipt of day care services. The paucity of statutory support for that conclusion is demonstrated by the vagueness of the provisions cited by the District Judge. The Court below cites N.Y. Soc. Serv. Law § 410-b, which does nothing more than authorize New York to receive federal money for day care services. It fails even to make reference to recipients of such services, let alone give them a property right in them. N.Y. Soc. Serv. Law § 410, also relied on by the District Court, simply authorizes public welfare officers to provide day care at public expense for certain children; it neither requires

* Since appellant Toia has never been provided with a copy of the so-called "Joint" Appendix, no reference to the Appendix can be provided. The indulgence of the Court is respectfully requested.

provision to any or all of any class of children nor gives those children selected or their parents any property right in the service. Without such basic authorizing statutes, New York could not participate in any day care programs funded under Title XX. Neither statute even hints at an entitlement to day care for any individual, yet those two statutes (and a New York City Executive Order creating the Agency for Child Development) were the District Court's sole basis for its startling conclusion that "it is evident that the plaintiffs have acquired a specific and legitimate expectation that they will be able to send their children to a day care center" (Opinion at p. 9).*

If anything is "evident," it is that New York law creates no entitlement to day care services in any circumstance. The method of provision of day care services reinforces this conviction. New York directly provides little in day care; most services are provided by licensed not-for-profit private day care centers,

* Even the District Court's finding of such an expectation, unsupported though it is, is insufficient to define a property right, if that expectation is unilateral. See Board of Regents v. Roth, supra.

which receive reimbursement from the local agency for every eligible child. Thus the obligation of the agency is simply to reimburse the centers which accept eligible children. Ultimate responsibility for finding a day care placement rests with the parents (though the local agency in practice assists in that effort). Indeed it is the duty of every center to refuse to accept children in some circumstances. See 18 New York Code Rules and Regulations ("N.Y.C.R.R.") §459.7(a)(1). An appropriate analogy to the day care placement scheme is the operation of the Medicaid program: while the state reimburses the recipient for the cost of any covered medical treatment he receives, the state bears no affirmative obligation to seek out and obtain for the recipient a particular medical treatment which he desires. Here, the state (through the local agency) reimburses the day care centers for services to eligible children, but has no legal obligation to find centers for each eligible child. Under the funding constraints of Title XX, such an obligation, if it did exist, would be impossible to meet. The waiting lists of eligible children certainly make that clear.

In the absence of such a state-created entitlement, parents receiving day care services, like an untenured public employee, have no due process rights in connection with the termination of that service. See Perry v. Sindermann, 408 U.S. 593 (1972); Bishop v. Wood, supra.

B. Even if a property right exists in the receipt of day care services, such a right does not preclude a shift in the location at which such a service is provided where the shift is due to budgetary constraint.

Even the existence of a cognizable property interest in the receipt of day care services would not in itself support the decision of the District Court below. Rather, its decision is premised on a property right in the location at which day care services are provided. The District Court held that "the plaintiffs have an entitlement to the use of a day care center as accessible as the one in which their children are presently enrolled." (Opinion, at 15). Thus, due process rights attached even though 72% of the plaintiff class were offered placement elsewhere before July 1, 1976 and the remainder will be offered placement by August 31, 1976 [Appendix 83]. Since no basis whatever

in New York law exists to support locational rights, the District Court order must be reversed.

The District Court fundamentally misapprehended the "de minimus" test for triggering due process protections. See Goss v. Lopez, 419 U.S. 575 (1975). If the only existing right is to receive day care services, then the location at which those services are offered is not merely de minimus but irrelevant. Since location is, by hypothesis, not implicated in the right simply to receive the service, a shift in location has no impact whatever on that right. Only if the right is to the location does a shift in location require due process scrutiny.

The District Court once again found such a right not in any explicit grants but rather from the vaguest implications of three regulations actually having no relationship whatever to the vesting of property rights in recipients. The regulations, 18 N.Y.C.R.R. §§ 459.7(a)(1), 459.11(c) and 459.16* simply establish standards for the centers and contain absolutely no hint that once a child starts going to one

* Cited by the District Court as §§ 459.6(a)(1), 459.10(c) and 459.15, respectively.

particular center he has a constitutionally protected right to continue to do so. To the contrary, since every licensed center must provide for the child in the manner specified therein, the child will be able to receive an equivalent level of programmatic services at every center. The implication then is that no property right need exist, and that none does. Lacking grounding in New York law, the District Court's finding of a locational property right was in error and must be reversed. Gasaway v. McMurray, 356 F. Supp. 1194 (S.D.N.Y., 1973), while finding a "substantial benefit," Id. at 1197, in the location of a day care center, offers no interpretation of New York law suggesting that this benefit is a property right, and thus gives no support to the District Court's decision herein. Further, that Court's finding of jurisdictional substantiality in that issue was a minimal finding certainly insufficient to support the granting of a preliminary injunction in this case. See Goosby v. Osser, 409 U.S. 512 (1973); Hagans v. Lavine, 415 U.S. 528 (1974); cf. Gresham v. Chambers, supra.

This Court has recently considered whether constitutional interests are implicated by the action of government in providing a welfare office in certain communities but not in others. Andrews v. Maher, 525 F. 2d 113 (2d Cir., 1975). The Court found an absence of a constitutional claim colorable even under the minimal standards of jurisdictional substantiality set forth in Hagans v. Lavine, supra. Andrews, supra, at 117. The Court found the proposition that "the Constitution prevents a state from providing governmental offices in only a limited number of locations . . . [to be] completely without merit." Id. The Court plainly recognized financial considerations as fully justifying limitations on the number of locations from which a government need function even though some welfare recipients were thereby compelled to utilize public transportation to continue to receive benefits. Id. Yet in this case plaintiff-appellees and the Court below seek to ignore the inexorable financial crisis confronting New York City and to force it to maintain every location from which it has ever permitted reimbursement for day care services.

The impact upon State and local government of recognizing "locational" rights as being protected by the Constitution would be enormous. It could have the effect of virtually freezing governmental programs in place, and would impede or even prohibit the reallocation of governmental resources -- even in the face of the most acute need and crying injustice. Neither new schools nor hospitals could replace old ones, since presumably school children and hospital patients would acquire, through the logical extension of this doctrine, constitutionally protected rights to receive services at the old locations. An experimental pilot program, once commenced, might never be able to come to an end, since the recipients would have protected rights to continue to receive the pilot service. The judicial recognition of "locational" rights would tend to stymie governmental innovation and experimentation precisely at a time those qualities should be encouraged to the greatest possible extent. This seems far too high a price to pay for what would amount to a constitutional right to avoid taking the bus or subway in order to obrain a governmental service. See N.A.A.C.P. v. United States Postal Service, 398 F. Supp. 562, 564 (N.D. Ga., 1975).

The motivation of New York City in defunding the 49 day care centers has never been alleged to have been ill-will toward plaintiffs or any other malevolent reason. This is not a case of governmental retaliation for exercise of a protected right such as free speech. Cf. Perry v. Sindermann, supra. Rather, it is simply a case of manifest need by a city in grave financial danger trying to maximize the level of services it can continue to provide its citizens. The New York City appellants argue cogently that they exercised all proper care and concern in rendering the defunding decisions. Now is the worst possible moment for this Court to assert a novel and heretofore unrecognized constitutional right -- one without any apparent basis in New York law, from which it must arise -- as having superiority to the urgent need for New York City to put its financial house in order to insure its own survival.

In identical circumstances Judge Pollack of the Southern District of New York has found that "[t]he plaintiffs have no statutory or other right to receive services from a specific day care center. ... Thus a reduction in services, where compelled by absence of funds available to ACD for the day care program

at a particular facility, would apparently not ground a constitutional right to a hearing." Windham v. City of New York, 405 F. Supp. 872, 876 (S.D.N.Y., 1976). The District Court below declined to follow that decision, choosing to embark instead on an uncharted constitutional path. This Court should follow the more prudent course paved by Judge Pollack and give full recognition to New York law, which creates no property rights in the continued receipt of day care services in a specific location.

Finally, even if a "locational" right did exist, due process does not require, as the Court below mistakenly held, that a hearing be held prior to defunding. In Mathews v. Eldridge, ____ U.S. ____, 44 U.S.L.W. 4224 (February 24, 1976), the Supreme Court held that due process did not require a hearing prior to termination of a disability benefit, as long as a fair and full hearing occurred after the termination. Here, a post-defunding hearing could satisfy plaintiffs' rights and permit New York City to fully effect its budgetary cutbacks immediately. A brief period of receiving services

in a nearby center would not seriously prejudice plaintiffs if funding was eventually restored to any or all of the 48 defunded centers, and irreparable harm to New York City would thereby be avoided. This comparison of relative harm certainly strongly supports reversal of the order below.

CONCLUSION

THE ORDER OF THE DISTRICT COURT GRANTING THE PRELIMINARY INJUNCTION SHOULD BE RESERVED WITH INSTRUCTIONS TO DISMISS THE COMPLAINT

Dated: New York, New York
July 19, 1976

Respectfully submitted,

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